(1)

Supreme Court, U.S.

05-1420 MAY 4 - 2006

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DOLORES C. PINO, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff in a Federal Tort Claims Act (FTCA) action for hearing damage caused by a forceful air pressure wave hitting her body as she walked home in her residential neighborhood, with the only things around at the time that could cause such a strong air pressure wave being jet aircraft taking off from and landing at O'Hare airport and the definite possibility of a military jet flying supersonically high above, who was not able to determine specific causation, is entitled to use the *res ipsa loquitur* inference of negligence.

2. Whether a proposed amendment to a negligence complaint which changes the manner of the breach of duty of care to conform to the evidence and anticipate the use of the *res ipsa loquitur* inference at trial constitutes a new claim barred by Federal Rule of Civil Procedure 15.

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2. The Seventh Circuit decision is in conflict with the decisions of this Court regarding whether a proposed amendment to a negligence complaint which changes the manner of the breach of duty of care to conform to the evidence and anticipate the use of *res ipsa loquitur* at trial constitutes a new claim barred by Fed. R. Civ. P. 15. 19-24

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W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts*, (5th ed. 1984) 17

Dolores C. Pino, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., is not reported. The opinion of the district court, App., is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2005. The petition for rehearing *en banc* of the Petitioner was denied on February 3, 2006, App. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The notifications required by R. 29.4 have been made.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are set forth in an appendix to the petition. App.

STATEMENT OF THE CASE

This case presents an important question on the use of the *res ipsa loquitur* doctrine in relation to the liability of the federal government under the FTCA for personal injury – hearing damage – caused by excessive jet noise in the national system of aircraft noise control over which it has asserted its full control through preemption. The occurrence involved a strong air pressure wave hitting a pedestrian when the only things around at the time of occurrence were aircraft taking off from and landing at O'Hare Airport and the definite possibility of a military jet flying supersonically high above.

The court of appeals and district court, the final decision of which was denying plaintiff's motion for reconsideration of the original district court decision, held that the plaintiff was not entitled to use the *res ipsa loquitur* doctrine to meet the proximate cause element of the negligence cause of action under the FTCA, and denied her motion for leave to file a second amended complaint seeking a change in the manner of breach of duty of care by the federal government, holding the change would have added a new claim.

Under the FTCA, the United States may be liable for torts of federal employees acting within the scope of their employment, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. §§ 2674, 1346(b)(1).

In Illinois, a plaintiff is entitled to the *res ipsa loquitur* inference of negligence if the "thing which caused the

injury is shown to be under the control or management of the party charged with negligence," and if "the occurrence is such as in the ordinary course of things would not have happened if the person so charged had used proper care." *Neace v. Laimans*, 951 F.2d 139, 141 (7th Cir. 1991), citing *Metz v. Central Ill. Electric & Gas Co.*, 32 Ill.2d 446 (1965).

This case also presents an important question of federal civil procedure regarding whether a plaintiff may amend the manner of breach of duty of care originally plead in a negligence cause of action without violating the federal pleading requirements, the court of appeals and district court having held such an amendment is barred.

REASONS FOR GRANTING THE PETITION

1. The petition presents an important question relating to the protection of the public safety, which the Seventh Circuit decided in ways which conflict with relevant decisions of this Court.

Plaintiff's body was hit from the right side and then engulfed by a large, forceful air pressure wave as she walked southbound to her home on a very humid and misty night in Morton Grove on February 5, 2001 at approximately 9:25 p.m. Pl.'s Ex. A. She felt intense pain inside her head as well as loud ringing in her right ear immediately upon the air pressure wave hitting her, and then intermittent pain for almost two years afterward. *Id.* The loud ringing (tinnitus) in her right ear has been constant from that moment. *Id.* As the air pressure wave hit the Plaintiff, she also heard a plane directly over her head, which seemed quite low and close to her. *Id.*

This occurrence happened amid a pattern of great amounts of jet noise from O'Hare Airport over the Plaintiff's residence and neighborhood for several years prior to the date of the occurrence. *Id.* Plaintiff kept a diary of these jet noise disturbances and complained about them to the City of Chicago, operator of O'Hare. *Id.* Plaintiff wrote down the time of the occurrence in her datebook when she reached her residence right afterward. *Id.* She sought medical care for the loud tinnitus in her right ear. *Id.*

She obtained the list of flights for that several hour period on February 5, 2001 from the City of Chicago's records a year and a half later, which contained one United Airlines plane departing O'Hare at a time that exactly matched the time she wrote down in her date book. *Id.* The official weather data she obtained several years later confirmed the high humidity of that evening. Pl.s Ex. K.

Nationally, airports and the number of jet aircraft flying in populated areas have been under constant expansion for years, with current plans by the FAA and the private airline industry for the expansion of thousands of airports, including O'Hare Airport. Tens of thousands of people in the U.S., therefore, remain at risk of injury or having their property damaged from excessive jet noise (including from the form of jet noise at issue in this case, air pressure waves).

The Seventh Circuit decision denied plaintiff here the use of the *res ipsa loquitur* inference of negligence because she was unable to specifically recreate how the planes around her at the time generated the air pressure wave that hit her, and held that the fact finder must have personal knowledge of such an occurrence for the use of the *res ipsa loquitur* doctrine at trial.

But it is difficult to envision how a plaintiff injured or a person whose property was damaged by jet-created air pressure waves could ever provide evidence of specific causation of such an event, or how enough people in the jury pool could obtain personal knowledge of the type of specific occurrence here to satisfy the Seventh Circuit and district court's test. Other authoritative legal sources state that it is only general life experience with the occurrence at issue that is required for the use of the *res ipsa* inference. The Seventh Circuit's holding, if repeated, would make it very difficult to bring negligence suits against the federal government and the owners of the jet aircraft for injuries or property damage caused by such jet aircraft-generated air pressure waves.

a. The Seventh Circuit decision directly contravenes the decisions of this Court on the use of the res ipsa loquitur evidentiary doctrine.

The Seventh Circuit panel decision contains the following statement in the third paragraph at 2 (emphasis added):

> While we must draw all reasonable inferences from the evidence in Pino's favor, [citation omitted] we do not think the causation sequence that Pino suggests is one that a layperson can reasonably infer based on personal knowledge [citation omitted]. Pino has not asserted that she is an expert on the causes of air pressure waves, nor has she presented an expert witness to say that *air pressure waves arise only from aircraft under negligent control.*

First, this passage contains the holding that for the Plaintiff to survive summary judgment, her evidence had to exclude all explanations for the cause of the occurrence (creation of the air pressure wave) other than the defendant's negligence. This holding violates the legal precedent of negligence causation, that a plaintiff need not exclude all but the defendant's negligence to absolute certainty, but only needs enough evidence to lead to a reasonable inference that the defendant's negligence is the more probable explanation. *Musgrave v. Union Carbide Corp.*, 493 F.2d 224 (7th Cir. 1974) (proof of negligence or causation need not be established by testimony so clear that it excludes every other speculative theory); *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39 (1968) (causal relation between alleged negligence and injury must be established by a preponderance of the evidence and with reasonable certainty).

Second, this passage contains the holding that the fact finder must have "personal knowledge" of the occurrence at issue in order for a plaintiff to be allowed the *res ipsa loquitur* inference, but this is an incorrect legal rule. The knowledge required is only general experience in life, not first-hand personal knowledge of the specific occurrence in a case. *See* Dan B. Dobbs, The Law of Torts, Vol. 1, "Substitutes for Factual Evidence, Res Ipsa Loquitur, Estimating the Probabilities of Negligence" at 373 (2001):

> it is only general experience in life that is required, not experience with the particular accident. So jurors have been permitted to conclude that when a modern airplane crashes without explanation and no other cause appears likely, that the operator of the plane was negligent, even though the jurors